

**FMCS Arbitration Symposium  
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**Evidence and Proof: What it Takes**

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**A. Introduction:** What does it take to prove your case in arbitration? <sup>1</sup>

**B. Burden of Proof and Quantum of Proof**

1. Burden of proof refers to which party has the ultimate responsibility to offer persuasive evidence on an issue, or on the merits of the case.
  - a. In a discipline case (such as discharge, suspension, reprimand, etc.), the employer carries the burden of proof on the issue of just cause, while the grieving party usually must offer evidence to show disparate treatment, discrimination, retaliation, and similar contentions.
  - b. The ultimate burden on the issue of just cause for discipline is placed with the employer based on a variety of reasons: a presumption of innocence akin to criminal charges; key facts and evidence particularly within the control of the employer; and potential stigma associated with the disciplinary charges.
  - c. In contract interpretation cases, the burden of proof ordinarily is placed on the union, or party raising the issue.
  - d. Who has the burden of proof in cases involving seniority, demotion, and similar disputes?

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<sup>1</sup> The Moderator and Panelists acknowledge, and thank, the National Academy of Arbitrators for providing some materials which assisted in the development of this presentation.

## 2. Issues Related to Burden of Proof

- a. Is it appropriate, in a discipline case, for the employer to call the grievant as a witness in the employer's Case in Chief? If requested, how might the arbitrator respond?
- b. Is it appropriate, in a contract interpretation case, for the union to call members of management as witnesses? Should the arbitrator allow that to occur, if the employer objects?
- c. What if the employer proves just cause to discipline; does that mean the penalty imposed by the employer has also been proven and should stand unchanged? Most arbitrators would say, "no," and would consider various factors in determining if the penalty was appropriate under the circumstances of the case.

## 3. Quantum of Proof

- a. Three standards are typically described:
  - **Preponderance of the evidence:** the decision-maker is more persuaded than not. Also described as a situation where one party has more persuasive evidence in its favor than the other party.
  - **Clear and convincing:** the evidence substantially supports the outcome, with little room for doubt. Also described as evidence that establishes with a high probability that the facts sought to be proven are true.
  - **Beyond a reasonable doubt:** fully satisfying the decision-maker to a moral certainty, or, in other words, where the arbitrator entertains no reasonable doubts as to the key issues in the case. This is the highest standard of proof and the standard utilized in criminal trials. It is rarely, if ever, applied in labor arbitration.
- b. Arbitrators may apply different standards in different cases. In discipline cases involving allegations of immoral conduct, criminal conduct, or socially stigmatizing behavior, arbitrators will sometimes apply the "clear and convincing" standard.

## C. Evidence

1. Witness Testimony: consider the point you are trying to prove and which witnesses have relevant testimony on that issue.

- a. Hearsay

- Defined in the *Federal Rules of Evidence* ("FRE") as, "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."
- Also defined as: a verbal or written statement by a person who is not a witness, offered to prove the truth of the matter that is stated.

- b. Hearsay does not include:

- Admissions by a party, or the grievant.
- Prior statements made by the declarant at a trial, hearing, deposition, or other judicial proceeding where declarant was subject to cross-examination and was given under oath.

- c. Historically, arbitrations have been much less formal than court proceedings and strict compliance with legal standards is not required. Formal rules of evidence may not be strictly enforced. Therefore, hearsay evidence may be allowed in some circumstances. The arbitrator may permit such evidence and give it limited weight.

- d. Hearsay exceptions under *FRE*, include, *inter alia*:

- Excited Utterance: spontaneous declarations or utterances, made without time for reflection by the declarant, often under stress. For ex., warning shouts or apologies at the time of a feared or actual accident.
- Recorded recollection: a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable him/her to testify fully and accurately. Typically, the memorandum or record was prepared when the matter was fresh in his/her memory.
- Public records and reports.
- Judgment of previous criminal conviction.

**e. Expert Testimony**

- Medical evidence: should you bring in the doctor, or will medical notes/letters suffice?

**2. Documentary evidence**

**a. Business records and official records: Who should testify regarding such records? Does the “custodian of records” need to be at the arbitration hearing?**

**b. Emails and text messages:**

- Do you have to introduce the entire chain of such documents?
- How reliable is such correspondence?
- What if no one at the hearing actually received or sent the email?
- Can you introduce a “screen shot” of a text message?

**c. Newspaper articles: Should they ever be introduced? For what purposes may they be relied upon?**

**d. Prior disciplinary records of the grievant.**

- Do such documents automatically come into the record?
- Is there a contractual provision limiting the use of prior disciplinary records?
- Did the employer cite to the employee’s prior disciplinary record as a basis for the discipline at issue?
- Is the union arguing for a lesser punishment based on the employee’s work history?

**e. Disciplinary records of other employees**

- Relevance of such records if the employees are in the same bargaining unit versus a different bargaining unit.
- Relevance of discipline issued to supervisors/managers for similar offenses.
- Disparate treatment claims.

- f. Internet website references; should the arbitrator consider such references as material and reliable evidence?

#### **D. Stipulations between the Parties**

1. May be worth the time to work out stipulations of facts, at least on some limited issues, prior to the hearing.
2. Discuss exhibits with other party prior to hearing and stipulate to Joint Exhibits.

#### **E. Subpoenas**

1. Consider the documents or witnesses you will need to prove your case, including any affirmative defenses.
2. Arrange to receive subpoenaed materials in advance to save time at the hearing.

#### **F. Virtual Arbitration Hearings**

1. Due to COVID-19, in-person hearings have become more difficult to arrange and safely carry out. Virtual arbitration hearings have become acceptable and common in many cases. Certainly, there are unique issues and challenges when conducting and/or participating in a virtual arbitration hearing.
  - Which video conferencing platform will the parties use? Consider security issues, ease of use, and availability to all parties and witnesses.
  - Will all witnesses be present in their own homes/offices, or will each party gather at a central location? For ex., will all the union witnesses meet at a union office, or the union attorney's office, with the employer witnesses gathered at a management location? Where will the attorneys be located? In their own homes, offices, or in a room with the Arbitrator?
  - Consider the use of a reporting service to obtain a secure transcript of the proceedings. Also, some reporting services will provide the services of a technical support person to insure the technology works and the hearing runs smoothly.

2. The parties should discuss potential exhibits before the hearing and exchange the exhibits, if possible, in advance. The exhibits may be electronically sent to the arbitrator and witnesses in advance. Another option is to send the documents via USPS, UPS, FedEx, etc. to the other party, the arbitrator, and the witnesses. You may want to keep some of the exhibits in a sealed envelope which would not be opened until the arbitration hearing.
3. Certain platforms allow for screen sharing during a hearing so that all participants may view the same document, or video.
4. You will have to consider the comfort level you, the arbitrator, your party, and your witnesses, have with the virtual arbitration process versus an in-person hearing.